

July 28 2010

*Ed Smith*  
CLERK OF THE SUPREME COURT  
STATE OF MONTANA

IN THE SUPREME COURT OF THE STATE OF MONTANA  
No. OP 10-0333

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**CHARLES LOKEY and VANESSA LOKEY,**

**Petitioners**

**vs.**

**MONTANA EIGHTEENTH JUDICIAL DISTRICT COURT,  
GALLATIN COUNTY, and THE HONORABLE WILLIAM NELS  
SWANDAL, Presiding Judge,**

**Respondents.**

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**ANDREW J. BREUNER'S RESPONSE BRIEF IN OPPOSITION  
TO PETITIONERS' PETITION FOR SUPERVISORY CONTROL**

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## **I. STATEMENT OF ISSUES PRESENTED FOR REVIEW**

1. Is this an appropriate matter for this Court to exercise supervisory control?
2. Did the District Court correctly determine Petitioner Charles Lokey violated Mont. Code Ann. § 61-8-324?

## **II. STATEMENT OF CASE**

This matter arises out of an accident which occurred on September 7, 2006, on South 19<sup>th</sup> Avenue in Bozeman, Montana, when a bicycle ridden by Mr. Lokey collided with a motor vehicle driven by Andrew J. Breuner while Mr. Breuner was making a left hand turn into a parking lot. Mr. Breuner had been stopped in the southbound lane of South 19<sup>th</sup> Avenue and made the left hand turn after a courtesy stop by James Bohrman, who was driving a dump truck for A.M. Welles, Inc. Mr. Lokey and his wife filed suit against Mr. Breuner, alleging he was negligent. Mr. Breuner filed a motion for summary judgment, based in part on the argument Mr. Lokey had been negligent *per se* because he violated Mont. Code Ann. § 61-8-324. The Lokeys thereafter moved for partial summary judgment, and both motions were fully briefed and argued to the District Court. By Order dated June 9, 2009, a copy of which is attached as Exhibit A, the District Court denied both motions. The District Court also correctly determined Mr. Lokey was negligent

*per se*. It is from this determination that Lokeys have petitioned this Court for a writ of supervisory control.

### **III. STATEMENT OF FACTS**

#### **A. ACCIDENT**

Mr. Breuner was stopped in the southbound lane of South 19<sup>th</sup> Avenue on September 7, 2006, and was waiting to turn into a parking lot. *See* Crash Investigator's Report filed by Officer Cory Klumb, a copy of which is attached as Exhibit B. A vehicle driven by Mary Noyes was behind Mr. Breuner's vehicle. *See* Noyes depo., relevant portions attached as Exhibit C, p. 11, lns. 14-24. The dump truck driven by Mr. Bohrman, which had an attached pup trailer, was in the northbound lane. *See* Bohrman depo., relevant portions attached as Exhibit D, p. 7, lns. 15-17; and Exhibit B. Mr. Breuner had his left turn blinker on, indicating he wished to make a left-hand turn into the parking lot. *See* Exhibit C, p. 11, lns. 19-20; Exhibit D, p. 19, lns. 1-2. Mr. Bohrman made a courtesy stop to allow Mr. Breuner to make the left turn. *See* Exhibit C, p. 11, lns. 24-25; Exhibit D, p. 36, lns. 23-25, p. 37, lns. 1-2; Breuner depo., relevant portions attached as Exhibit E, p. 29, ln. 25, p. 30, lns. 1-2. Mr. Breuner recalled Mr. Bohrman had gestured to him to come through, and Mr. Bohrman testified he probably gave Mr. Breuner a hand signal. *See* Exhibit E, p. 30, lns. 3-8; Exhibit D, p. 19, lns. 11-14.

Prior to the courtesy stop, Mr. Bohrman had been traveling north on South 19<sup>th</sup> Avenue, during which time he had been in a cat-and-mouse situation with a bicycle ridden by Mr. Lokey where their vehicles would go back and forth being in front of each other. *See* Exhibit D, p. 30, lns. 7-15. Mr. Lokey had been riding on the fog line before pulling over a little bit when cars started passing him. *See* Lokey depo., relevant portions attached as Exhibit F, p. 24, lns. 24-25, p. 25, lns. 1-2. Mr. Lokey crossed the fog line when the dump truck driven by Mr. Bohrman passed him, and Mr. Bohrman believes Mr. Lokey was riding on the paved part of the shoulder outside of the fog line. *See* Exhibit F, p. 29, lns. 2-4; Exhibit D, p. 12, lns. 3-14. According to Mr. Lokey, he was riding alongside the dump truck until the point of impact. *See* Exhibit F, p. 26, lns. 16-18.

After Mr. Bohrman's courtesy stop, Mr. Breuner made a safe left-hand turn into the parking lot. *See* Exhibit E, p. 30, lns. 20-22. Mr. Bohrman described Mr. Breuner's turn as normal, and he believes the turn was not sharp. *See* Exhibit D, p. 19, lns. 15-18. Ms. Noyes classified Mr. Breuner's turn as a gentle left-hand turn with no screeching or roaring. *See* Exhibit C, p. 21, lns. 1-9. During the left-hand turn, Mr. Lokey's bicycle collided with Mr. Breuner's vehicle. *See* Exhibit B. Mr. Lokey's vehicle had passed the dump truck driven by Mr. Bohrman, because the nose of the dump truck was slightly behind the point of impact. *See*

Exhibit D, p. 33, lns. 20-22. Mr. Breuner did not see Mr. Lokey prior to the impact. *See* Exhibit E, p. 12, lns. 3-4. In fact, Mr. Bohrman testified it would have been virtually impossible for Mr. Breuner to have seen Mr. Lokey. *See* Exhibit D, p. 21, lns. 16-25, p. 22, lns. 1-2. Even Mr. Lokey, who never saw Mr. Breuner's vehicle, agrees it is fair to say the odds are Mr. Breuner could not have seen him. *See* Exhibit F, p. 41, lns. 12-13, 18-22.

Mr. Breuner's disclosed expert, F. Denman Lee, Ph.D., analyzed the collision. Dr. Lee has a Ph.D. in experimental nuclear physics; is an Emeritus Physics Professor at Montana State University, where he taught physics for 25 years; has studied accident reconstruction at the Northwest Traffic Institute; has attended ten week-long seminars in accident reconstruction sponsored by the Engineering Dynamics Corporation; and has reconstructed approximately 700 accidents since 1970. *See* Dr. Lee's Report, attached as Exhibit G, p. 1. Dr. Lee reviewed extensive information in performing his analysis, including the Crash Investigator's Report; voluntary witness statements by Ms. Noyes and Mr. Bohrman; sworn deposition testimony of Mr. Breuner, Mr. Lokey, Officer Klumb, Ms. Noyes, and Thomas McCormick; the Lokeys' Complaint; Mr. Breuner's Answer and Jury Demand; correspondence from Plaintiffs' counsel to John Stockman; Mr. Lokey's Responses to Mr. Breuner's First Discovery Requests; 26

color copies of photographs taken at the accident scene by the Bozeman Police Department; 14 color copies of photographs of the damage to Mr. Breuner's vehicle taken by Mr. Breuner; 65 color copies of photographs taken by an investigator on behalf of Mr. Breuner; survey data from the accident site taken on June 13, 2008, with a Nikon Total Station; supplemental survey data taken on July 23, 2008; photographs and measurements taken on July 21, 2008, of the dump truck and pup trailer driven by Mr. Bohrman on the date of the accident; and dimensional and inertial data obtained through the Expert AutoStats computer data base. *See* Exhibit G, p. 2. Dr. Lee applied the laws of Newtonian physics to this information to reach his conclusions. *See* Exhibit G, pp. 2-3. Dr. Lee determined it took Mr. Breuner's vehicle approximately 4.25 seconds to reach the point of impact, at which time the vehicle was traveling at approximately 16 miles per hour. Assuming a speed of 15 miles per hour by Mr. Lokey based on his testimony that he was traveling 15-20 miles per hour just prior to the point of impact, Dr. Lee determined Mr. Lokey traveled approximately 93 feet during the 4.25 seconds it took Mr. Breuner's vehicle to reach the point of impact. Since the dump truck and pup trailer driven by Mr. Bohrman was approximately 68 feet long, Dr. Lee determined Mr. Lokey was entirely behind or to the south of the dump truck and trailer when Mr. Breuner started his left-hand turn. This means

Mr. Lokey was overtaking and attempting to pass the dump truck and pup trailer on the right when the collision occurred. *See Exhibit G, p. 3.*

The accident was investigated by Officer Klumb, a certified traffic accident reconstructionist who Mr. Breuner has disclosed as an expert. He has 240 hours of crash investigation training, including an 80-hour at-scene traffic investigation course with the highway patrol and an 80-hour technical crash investigation school. *See Klumb depo., relevant portions attached as Exhibit H, p. 5, lns. 4-25, p. 6, lns. 1-5.* As part of his investigation, Officer Klumb interviewed witnesses. Officer Klumb does not recall whether he interviewed Ms. Noyes personally, but he does recall talking to Mr. Bohrman. *See Exhibit H, p. 14, lns. 21-25, p. 15, lns. 7-9, 16-19.* Officer Klumb testified regarding the witness interviews: "If I didn't have any witnesses, the outcome of the investigation would have been the same. I mean, the physical evidence – [Mr. Bohrman's] statement backed up the physical evidence that was there." *See Exhibit H, p. 16, lns. 14-18.* Officer Klumb considered the physical evidence, including the broken tubes on Mr. Lokey's bicycle, and determined this was caused by the bicycle's momentum. *See Exhibit H, p. 16, lns. 19-25, p. 17, lns. 1-15.* Officer Klumb additionally determined Mr. Lokey's bicycle had been riding on the paved shoulder based on the position of Mr. Breuner's vehicle, the position of Mr. Lokey in the driveway just outside of

the paved shoulder, and Officer Klumb's knowledge of the traffic conditions at that particular time. *See* Exhibit H, p. 18, lns. 20-25, p. 19, ln. 1. Officer Klumb further testified the witness statements confirmed the bicycle had been passing vehicles on the right-side on the paved shoulder. *See* Exhibit H, p. 19, lns. 3-6.

Officer Klumb issued a citation to Mr. Lokey for violating Mont. Code Ann. § 61-8-602, which provides a bicycle must obey the same traffic laws as a car. *See* Exhibit H, p. 26, lns. 14-20. Officer Klumb testified the specific law Mr. Lokey violated was Mont. Code Ann. § 61-8-324, which limits when a vehicle can be passed on the right. *See* Exhibit H, p. 27, lns. 24-25, p. 28, lns. 1-25. Mr. Lokey forfeited bond and paid the fine for the ticket he received. *See* Exhibit F, p. 46, lns. 4-11. In Officer Klumb's opinion, there was a point in time when the front end of Mr. Breuner's vehicle would have come by the front end of the dump truck and should have been apparent as something to avoid. *See* Exhibit H, p. 22, lns. 10-19. However, damage to Mr. Lokey's helmet suggests his head was down at the time of the collision. *See* Exhibit H, p. 22, lns. 20-25. In Officer Klumb's opinion, Mr. Lokey was responsible for the collision because he was somewhere he did not belong. *See* Exhibit H, p. 42, lns. 16-22. Mr. Breuner had no obligation to look for a bicycle passing the dump truck on the right because there was only one lane of traffic and anything outside of that was not supposed to be

there. *See* Exhibit H, p. 57, lns. 6-18. Officer Klumb described Mr. Breuner's turn as legal because the flow of traffic was not interrupted since Mr. Bohrman had stopped. *See* Exhibit H, p. 38, lns. 4-16.

**B. DISTRICT COURT'S ORDER ON MOTIONS FOR SUMMARY JUDGMENT**

By Order dated June 9, 2009, the District Court denied Mr. Breuner's motion for summary judgment and the Lokeys motion for partial summary judgment. *See* Exhibit A, p. 1. In its Analysis, the District Court reasoned in pertinent part:

The defendant moved the Court for summary judgment arguing that plaintiff Charles Lokey (Lokey) was negligent *per se* because he violated a motor vehicle statute, because the accident was not caused by any negligence on the part of Andrew Breuner (Breuner), and because Lokey was more than 50% at fault for the accident.

It is true that Lokey violated §61-8-324, M.C.A. and was cited for that violation. "[A]s between two drivers - one who has been free from fault and violated no law, and one who has violated a law upon which the other depended - fault should, as a matter of public policy, be attributed to the person who violated the law. *See Craig v. Schell*, 1999 MT 40 ¶16, 293 Mont. 323, 975 P.2d 820. The defendant argues that because Lokey received a citation, paid the fine for his ticket and therefore admitted violation of the statute, there is no genuine issue of material fact regarding his negligence *per se* in this matter. Lokey counters that there are facts in dispute regarding the circumstances which resulted in the accident, and that he didn't fight the ticket does not mean he agreed with the officer's assessment of the situation. Additionally, Lokey argues that officer and expert testimony does not create irrefutable facts. The Court agrees. Although the Court will not allow Lokey to argue whether the citation

was appropriate or accurate, it is up to the finder of fact to determine the sequence of events which lead to the issuance of the citation. The Court also believes that the fact-finder must determine whether Breuner was free from fault - whether he received a citation or not. That Breuner did not receive a citation does not equate with Breuner being free from fault as required by *Craig*, supra.

See Exhibit A, pp. 2-3.

#### **IV. STANDARD OF REVIEW**

This Court reviews a district court's summary judgment ruling de novo to determine whether the district court was correct. *Talmage v. City of Kalispell*, 2009 MT 434, ¶ 12, 354 Mont. 125, 223 P.3d 328.

#### **V. SUMMARY OF ARGUMENT**

This Court should not exercise supervisory control in this matter, as the Lokeys have failed to establish either that the normal appeal process is an inadequate remedy or that the District Court is proceeding under a mistake of law which is causing the Lokeys a gross injustice.

The District Court correctly determined based on the facts and evidence that Mr. Lokey was negligent *per se* in violating Mont. Code Ann. § 61-8-324, and this determination will not prevent adjudication of this matter on the merits.

## **VI. ARGUMENT**

### **A. SUPERVISORY CONTROL IS NOT APPROPRIATE IN THIS MATTER**

The Montana Rules of Appellate Procedure provide in pertinent part regarding when the exercise of supervisory control by this Court is appropriate:

Supervisory control is an extraordinary remedy and is sometimes justified when urgency or emergency factors exist making the normal appeal process inadequate, when the case involves purely legal questions, and when . . . [t]he other court is proceeding under a mistake of law and is causing a gross injustice.

Rule 14(3), M.R.App.P. This Court has explained “[s]upervisory control is an extraordinary remedy exercised only in extraordinary circumstances.” *Hegwood v. Mont. Fourth Jud. Dist. Ct.*, 2003 MT 200, ¶ 6, 317 Mont. 30, 75 P.3d 308. This Court has previously determined in regards to a petition for supervisory control based on the denial of a motion for summary judgment:

In the absence of extraordinary and compelling circumstances beyond simply requiring a party to proceed to trial, we decline to review the order of the district court denying summary judgment by supervisory control or other extraordinary writ.

*State ex rel. Kosena v. Dist. Ct. of First Jud. Dist. in and for Co. of Lewis and Clark*, 172 Mont. 21, 22-23, 560 P.2d 522, 523 (1977).

The Lokeys’ sole argument that the normal appeal process is inadequate in the present matter is another part of this matter is currently before this Court on

interlocutory appeal. However, the Lokeys' petition for supervisory control is not part of the on-going interlocutory appeal, which is numbered DA 10-0101, and constitutes a separate proceeding before this Court, numbered OP 10-0333. Since the Lokeys' petition for supervisory control is a separate proceeding, allowing it to go forward would not enhance the judicial efficiency of this Court. Instead, granting the petition for supervisory control would require this Court to consider the issue raised herein now, whereas there is only the possibility this Court would have to consider this issue on appeal after the matter is concluded before the District Court. While such a procedure could serve the judicial efficiency of the District Court, the same would be true of any ruling by a district court which could be overturned on a subsequent appeal. Just as the normal appeal process is adequate and does not constitute a gross injustice in such other cases, it is adequate and does not constitute a gross injustice in the present matter. As such, the Lokeys' petition does not present the extraordinary circumstances justifying the extraordinary remedy of supervisory control, and Mr. Breuner respectfully requests this Court deny the Lokeys' petition. This is especially true because, as discussed below, the District Court is not proceeding under a mistake of law.

**B. THE DISTRICT COURT CORRECTLY DETERMINED MR. LOKEY VIOLATED MONT. CODE ANN. § 61-8-324**

This Court has explained the relationship between negligence *per se* and violation of motor vehicle statutes as follows: “[A]s between two drivers—one who has been free from fault and violated no law, and one who has violated a law upon which the other depended-fault should, as a matter of public policy, be attributed to the person who violated the law.” *Craig*, ¶ 16. Based on this reasoning, this Court has determined violation of a motor vehicle statute constitutes negligence as a matter of law except in extremely limited circumstances such as sudden brake failure. *Craig*, ¶ 29. The statute at issue in the present matter provides:

- (1) The operator of a vehicle may overtake and pass upon the right of another vehicle only under the following conditions:
  - (a) when the vehicle overtaken is making or about to make a left turn; or
  - (b) upon a roadway with unobstructed pavement of sufficient width for two or more lanes of vehicles moving lawfully in the direction being traveled by the overtaken vehicle.
- (2) The operator of a vehicle may overtake and pass another vehicle upon the right only under conditions permitting safe movement. The movement may not be made by driving off the pavement or main-traveled portion of the roadway.

Mont. Code Ann. § 61-8-324.

The facts are clear Mr. Lokey violated this statute. He could not legally pass the dump truck on the right pursuant to Mont. Code Ann. § 61-8-324(1) both

because the dump truck was not making a left turn and because the northbound lane of South 19<sup>th</sup> Avenue at the point of impact was only one lane. Mr. Lokey's pass of the of the dump truck on the right was also not legal pursuant to Mont. Code Ann. § 61-8-324(2) because he had crossed the fog line. *See, e.g., State v. Herbenson*, 2001 MT 75, ¶ 16, 305 Mont. 68, 22 P.3d 1128 ("Passing two vehicles that are stopped at an intersection and in the outermost lane of traffic by driving between those vehicles and the curb could certainly be characterized as unsafe").

Contrary to the Lokeys' assertion, there is substantial evidence that Mr. Lokey overtook and pass the dump truck driven by Mr. Bohrman. Mr. Bohrman testified his vehicle and Mr. Lokey's bicycle would go back and forth being in front of each other. Dr. Lee also determined Mr. Lokey was entirely behind or to the south of the dump truck and pup trailer when Mr. Breuner started his left-hand turn. Dr. Lee's expert testimony is admissible pursuant to Rule 702, M.R.Evid., given his training and experience. *See Baldauf v. Arrow Tank and Engr. Co., Inc.*, 1999 MT 81, ¶¶ 22-29, 294 Mont. 107, 979 P.2d 166. Dr. Lee's expert testimony is also admissible pursuant to Rule 703, M.R.Evid., given his field investigations and the extensive documentation he reviewed in reaching his opinions. *See Krueger v. Gen. Motors Corp.*, 240 Mont. 266, 279-80, 783 P.2d 1340, 1349 (1989). Officer Klumb also testified the witness statements confirmed the bicycle

had been passing vehicles on the right-side on the paved shoulder. Given Officer Klumb's investigation and experience in accident reconstruction discussed above, his opinions regarding the cause of the accident are admissible. *See Campbell v. Johnson*, 251 Mont. 12, 15-16, 823 P.2d 237, 238-39 (1992). Given the available facts and evidence, the District Court correctly determined Mr. Lokey violated Mont. Code Ann. § 61-8-324, and was therefore negligent *per se* pursuant to *Craig*.

The Lokeys' contention that the District Court's determination that Mr. Lokey violated Mont. Code Ann. § 61-8-324 will prevent adjudication on the merits is also incorrect. The Lokeys' suggest the District Court's determination "paves the way" for admission of evidence of the citation Mr. Lokey received. However, the District Court's Order does not indicate evidence of the citation would be deemed admissible to the jury, and Mr. Breuner will not seek to admit such evidence pursuant to *Smith v. Rorvik*, 231 Mont. 85, 90, 751 P.2d 1053, 1056 (1988). Additionally, the determination Mr. Lokey was negligent *per se* does not constitute a final adjudication of this matter as recognized by the District Court's Order. The elements of causation and damages must still be considered upon a determination of negligence *per se*. *Stipe v. First Interstate Bank-Polson*, 2008 MT 239, ¶ 14, 344 Mont. 435, 188 P.3d 1063. This Court has also held a

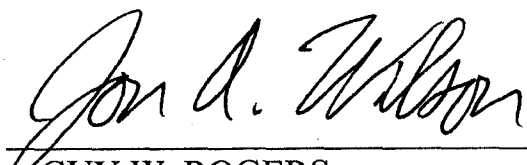
determination of negligence *per se* does not bar the apportionment of negligence liability based on a comparative negligence scheme. *Giambra v. Kelsey*, 2007 MT 158, ¶ 51, 338 Mont. 19, 162 P.3d 134. In total, the District Court's correct determination that Mr. Lokey violated § 61-8-324 will not prevent adjudication of this matter on the merits.

## **VII. CONCLUSION**

This matter does not present the extraordinary circumstances justifying the extraordinary remedy of supervisory control, as the normal appeal process is an adequate remedy. The District Court is also not proceeding under a mistake of law, as the District Court correctly determined Mr. Lokey violated § 61-8-324, and this determination will not prevent adjudication of this matter on the merits. For these reasons, Mr. Breuner respectfully requests that this Court deny the Lokeys' Petition for Supervisory Control.

RESPECTFULLY SUBMITTED this 27<sup>th</sup> day of July, 2010.


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## **CERTIFICATE OF COMPLIANCE**

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify this Response Brief in Opposition to Petitioners' Petition for Supervisory Control is printed with a proportionately spaced Time New Roman text typeface of 14 points; is double spaced; and the word count is 3,593 words, excluding Table of Contents, Certificate of Compliance, and Certificate of Service.

By:

A handwritten signature in cursive script, appearing to read "Jon A. Wilson", is written over a horizontal line.

GUY W. ROGERS

JON A. WILSON

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**CERTIFICATE OF SERVICE**

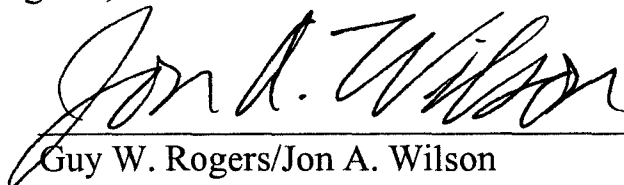
The undersigned does hereby certify that a true and correct copy of the foregoing was served upon the following on the 27<sup>th</sup> day of July, 2010, by

U.S. mail, postage prepaid and addressed as follows:

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